

U.S. DISTRICT COURT
DISTRICT OF MASS.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

2003 SEP 22 P 5: 34

In re: PHARMACEUTICAL INDUSTRY)	
AVERAGE WHOLESALE PRICE)	MDL DOCKET NO. 1456
LITIGATION)	
<hr/>		
THIS DOCUMENT RELATES TO:)	Civil Action No. 01-CV-11157
<i>Swanston v. TAP Pharmaceutical Products</i>)	Lead Case No. 01-CV-12257
<i>Inc., et al.</i>)	Judge Patti B. Saris

DEFENDANT TAP PHARMACEUTICAL PRODUCTS INC.'S
MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, Defendant TAP Pharmaceutical Products Inc. ("TAP") hereby moves the Court for a Protective Order barring Plaintiff Robert J. Swanston ("Swanston") from taking the deposition of TAP's lead counsel, Daniel E. Reidy, in connection with this litigation. In support of its Motion, TAP states as follows:

1. On June 13, 2003, the Judicial Panel on Multidistrict Litigation ("MDL Panel") issued a Transfer Order transferring the case *Robert J. Swanston v. TAP Pharmaceutical Products Inc., et al.*¹ from the United States District Court for the District of Arizona to this Court for coordination with *In Re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL Docket No. 1456. (See Ex. 1).

2. On September 17, 2003, absent the compelling circumstances ordinarily required for such action, counsel for Plaintiff Swanston served on TAP a Notice of Deposition for Daniel

¹ Counsel for Plaintiff Swanston, Donald E. Haviland, also represents plaintiffs in two actions pending against TAP for the same conduct alleged here: *Stetser, et al. v. TAP Pharmaceutical Products Inc., et al.*, No. 01-CV-5268 (New Hanover County, North Carolina) and *Walker v. TAP Pharmaceutical Products Inc., et al.*, No CPM-1-682-01 (Cape May County, New Jersey).

E. Reidy, TAP's lead counsel in this case. (*See* Ex. 2). No subpoena pursuant to Fed. R. Civ. P. 45 accompanied the Notice of Deposition for Mr. Reidy. (*See id.*)

3. Plaintiff Swanston's Notice of Deposition for Mr. Reidy is invalid on its face. Since Mr. Reidy is not a party to the *Swanston* case, he may be compelled to provide deposition testimony only by way of a valid subpoena issued pursuant to Fed. R. Civ. P. 45. *See Pace v. Furdon*, 461 F. Supp. 231, 232 (D. Mass. 1978) ("It is well-settled law that the attendance of a non-party deponent may be compelled only by service upon him of a deposition subpoena."). Plaintiff has not complied with Rule 45.²

4. Regardless, Plaintiff Swanston's attempt to depose TAP's lead counsel is inappropriate and contravenes well-established legal principles barring the deposition of a party's counsel. *See, e.g., Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (denying deposition of opposing counsel, and noting that "[t]aking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation."). Courts have routinely held that the deposition of a party's counsel may only be taken when the party seeking to take the deposition meets its burden of establishing that (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought from opposing counsel is relevant and non-privileged; and (3) the information sought from opposing counsel is critical to the preparation of the case. *Id.*; *see also Pereira v. United Jersey Bank*, Nos. 94 Civ. 1565 and 94 Civ. 1844, 1997 WL 773716, *7-8 (S.D.N.Y. Dec. 11, 1997) (denying deposition of opposing counsel because party seeking deposition failed to demonstrate that no other means existed to obtain the information); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*,

² Plaintiffs in the *Stetser* and *Walker* cases have also noticed the deposition of Mr. Reidy for the same dates as Plaintiff Swanston, and similarly failed to issue proper subpoenas for those depositions.

117 F.R.D. 83, 85 (M.D.N.C. 1987) (denying deposition of opposing counsel for failure to meet the *Shelton* factors, and noting that “[i]f there are other persons available who have the information, they should be deposed first” and that “other methods such as written interrogatories, which do not involve the same dangers as an oral deposition, should be employed.”).

5. In fact, “the mere request to depose a party’s attorney constitutes good cause for obtaining a [Rule 26(c) Protective Order] unless the party seeking the deposition can show both the propriety and the need for the deposition.” *N.F.A. Corp.*, 117 F.R.D. at 85; *see also Dunkin’ Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. 208, 210 (D.P.R. 1998) (same); *Phoenix Mutual Life Insurance Co. v. College Court*, No. 92-2254, 1993 WL 841191, *1 (D. Kan. May 17, 1993) (same); *Niagra Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 125 F.R.D. 578 (N.D.N.Y. 1989) (“Because the deposition of a party’s attorney is usually both burdensome and disruptive, the mere request to depose a party’s attorney constitutes good cause for obtaining a Rule 26(c) . . . protective order.”) (internal citations omitted).

6. Plaintiff Swanston has made no effort to articulate the purported need for his deposition notice to TAP’s lead counsel, let alone overcome TAP’s presumptive entitlement to a Rule 26(c) Protective Order barring the deposition of Mr. Reidy. Plaintiff Swanston has failed to meet his burden on even one of these required showings which would allow him to depose Mr. Reidy.³ He has not demonstrated that the information he seeks from Mr. Reidy is relevant, crucial to the preparation of his case, and non-privileged. Neither has Plaintiff Swanston established that there are no other means through which he can obtain the information he seeks.

³ During the Rule 7.1 Conference on this Motion, counsel for Plaintiff Swanston refused to identify how he intends to satisfy his burden on this issue. The failure to even attempt to meet the burden cannot help but raise the question of whether Plaintiff Swanston’s attempt to depose Mr. Reidy is made in good faith.

Without meeting his burden on these required showings, TAP is entitled to a Protective Order barring Plaintiff Swanston from attempting to depose TAP's lead counsel.

REQUEST FOR ORAL ARGUMENT

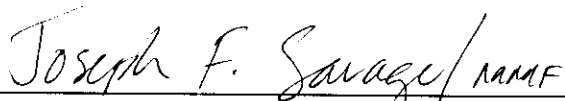
Defendant TAP respectfully requests that the instant Motion for Protective Order be set for oral argument on October 9, 2003, the same date that the parties to this action will be appearing before the Court on Plaintiff Swanston's Remand Motion and before the October 20, 2003 date stated by Plaintiff in his Notice of Deposition.

CONCLUSION

For the foregoing reasons, TAP respectfully requests that this Court grant its Motion for Protective Order and bar Plaintiff Swanston from deposing TAP's lead counsel, Daniel E. Reidy, in connection with this matter.

Dated: September 22, 2003

Respectfully submitted,


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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

In re: PHARMACEUTICAL INDUSTRY)	
AVERAGE WHOLESALE PRICE)	MDL DOCKET NO. 1456
LITIGATION)	
)	Civil Action No. 01-CV-11157
<hr/> THIS DOCUMENT RELATES TO:)	Lead Case No. 01-CV-12257
<i>Swanston v. TAP Pharmaceutical Products</i>)	
<i>Inc., et al.</i>)	Judge Patti B. Saris

[PROPOSED] ORDER

This matter coming before the Court pursuant to Defendant TAP Pharmaceutical Products Inc.'s Motion for Protective Order;

IT IS HEREBY ORDERED:

That TAP's Motion for Protective Order is hereby GRANTED. Plaintiff Robert J. Swanston is hereby barred from deposing Daniel E. Reidy, lead counsel for Defendant TAP Pharmaceutical Products Inc., in connection with this matter.

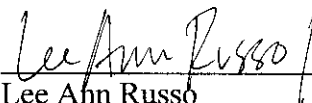
Dated: _____, 2003

The Honorable Patti B. Saris
United States District Judge

**CERTIFICATION OF ATTORNEY CONFERENCE
PURSUANT TO LOCAL RULES 7.1(A)(2) AND 37.1**

Pursuant to Fed. R. Civ. P. 26(c) and L.R. 7.1(A)(2) and 37.1, counsel for Defendant TAP Pharmaceutical Products Inc., hereby certifies that she has conferred, on behalf of moving Defendant, with counsel for Plaintiff by telephone, and has made reasonable and good faith efforts to resolve or narrow the issues presented by Defendant TAP Pharmaceutical Products Inc.'s Motion for Protective Order.

Dated: September 22, 2003

 / MMF

Lee Ann Russo

CERTIFICATE OF SERVICE

I, Monica M. Franceschini, hereby certify that on September 22, 2003, a true and correct copy of Defendant TAP Pharmaceutical Products Inc.'s Motion For Protective Order was delivered to all counsel of record by electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to Verilaw Technologies for posting and notification to all parties, and was also served the following parties in MDL 1430 as indicated below:

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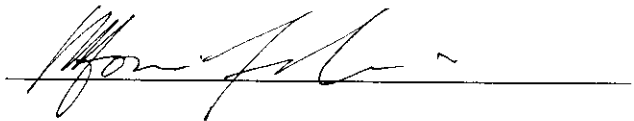
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JUDICIAL PANEL ON MULTIDISTRICT LITIGATION**

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MEMBERS:
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United States District Court
Southern District of New York

Judge Bruce M. Selya
United States Court of Appeals
First Circuit

Judge Julia Smith Gibbons
United States Court of Appeals
Sixth Circuit

Judge D. Lowell Jensen
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Northern District of California

Judge J. Frederick Motz
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Judge Robert L. Miller, Jr.
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<http://www.jpml.uscourts.gov>

June 13, 2003

TO INVOLVED COUNSEL

Re: MDL-1456 -- In re Pharmaceutical Industry Average Wholesale Price Litigation

Robert J. Swanston v. TAP Pharmaceutical Products, Inc., et al., D. Arizona, C.A. No. 2:03-62

Dear Counsel:

For your information, I am enclosing a copy of an order filed today by the Judicial Panel on Multidistrict Litigation involving this matter.

Very truly,

Michael J. Beck
Clerk of the Panel

By Jessie Bishop
Deputy Clerk

Enclosure

JPML Form 34B

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

JUN 13 2003

FILED
CLERK'S OFFICE

DOCKET NO. 1456

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE
LITIGATION

Robert J. Swanston v. TAP Pharmaceutical Products, Inc., et al., D. Arizona, C.A. No. 2:03-62

**BEFORE WM. TERRELL HODGES, CHAIRMAN, JOHN F. KEENAN,
BRUCE M. SELYA,* JULIA SMITH GIBBONS, D. LOWELL JENSEN,* J.
FREDERICK MOTZ AND ROBERT L. MILLER, JR., JUDGES OF THE
PANEL**

TRANSFER ORDER

Presently before the Panel is a motion, pursuant to Rule 7.4, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001), by plaintiff in this action (*Swanston*) to vacate the Panel's order conditionally transferring *Swanston* to the District of Massachusetts for inclusion in the Section 1407 proceedings occurring there in this docket. All responding defendants oppose the motion to vacate and favor inclusion of this action in Section 1407 proceedings.

On the basis of the papers filed and hearing session held, the Panel finds that *Swanston* involves common questions of fact with the actions in this litigation previously transferred to the District of Massachusetts, and that transfer of this action to that district for inclusion in the coordinated or consolidated pretrial proceedings occurring there will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. The Panel further finds that transfer is appropriate for reasons expressed by the Panel in its original order directing centralization in this docket. The Panel held that the District of Massachusetts was a proper Section 1407 forum for actions concerning whether (either singly or as part of a conspiracy) the pharmaceutical defendants engaged in fraudulent marketing, sales and/or billing schemes by unlawfully inflating the average wholesale price of certain prescription drugs in order to increase the sales of these drugs to health care professionals and thereby boost the pharmaceutical companies' profits. See *In re Pharmaceutical Industry Average*

* Judges Selya and Jensen did not participate in the decision of this matter. In light of the fact that other Panel members could be members of the putative class(es) in this litigation, each of those members has filed with the Clerk of the Panel a formal renunciation of any claim that he might have as a putative class member, thereby removing any basis for a disqualification on that ground. Alternatively, should it be determined for any reason that a disqualification survives the renunciation of any claim, the Panel invokes the Rule of Necessity to decide the matters now before it on the authority of, and for reasons explained in, *In re Wireless Telephone Radio Frequency Emissions Products Liability Litigation*, 170 F.Supp.2d 1356, 1357-58 (J.P.M.L. 2001).

- 2 -

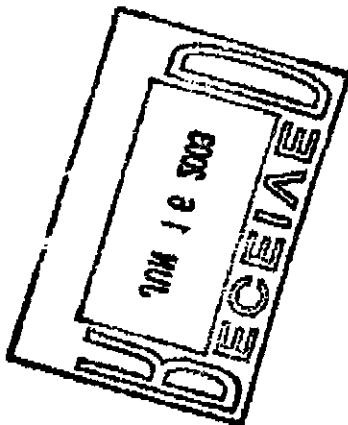
Wholesale Price Litigation, 201 F.Supp.2d 1378 (J.P.M.L. 2002).

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, *Robert J. Swanston v. TAP Pharmaceutical Products, Inc., et al.*, D. Arizona, C.A. No. 2:03-62, is transferred to the District of Massachusetts and, with the consent of that court, assigned to the Honorable Patti B. Saris for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

FOR THE PANEL:



Wm. Terrell Hodges
Chairman



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

MDL NO. 1456

THIS DOCUMENT RELATES TO
ROBERT J. SWANSTON, individually and on
behalf of himself and all others similarly situated

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

v.

TAP PHARMACEUTICAL PRODUCTS INC.
ET AL.

NOTICE OF DEPOSITION OF
DANIEL E. REIDY, ESQUIRE

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18 **PLEASE TAKE NOTICE** that Plaintiff, Robert J. Swanston, by and through his attorneys,
 19 Kline & Specter, P.C., will take the following deposition pursuant to Rules 26 and 30 of the Federal
 20 Rules of Civil Procedure at the location, date and time shown below:

21 **Deponent:** Daniel E. Reidy, Esquire

22 **Location:** **JONES DAY REAVIS & FOGUE**
 77 West Wacker
 23 Chicago, IL 60601-1692

24 **Date and Time:** October 20-21, 2003 at 9:30 a.m.

25 The deposition will be upon oral examination and recorded by stenographic and videotape
 26 transcription. The deposition shall take place before a Notary Public or other officer authorized by

1 law to administer oaths and will continue from day to day until completed.
2

3 KLINE & SPECTER, P.C.
4 1525 Locust Street, 19th Floor
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6 Dated: September 17, 2003
7

8 By: R. Matthew Plona
9 R. MATTHEW PLONA, ESQUIRE
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CERTIFICATE OF MAILING

I hereby certify that Notice of Deposition of Daniel E. Reidy, Esquire was duly served this date, September 17, 2003, on the following parties, via facsimile and U.S. First Class Mail, postage prepaid:

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2003 SEP 22 P 5:34

September 22, 2003

By Hand Delivery

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RE: In re: Pharmaceutical Industry Average Wholesale Price Litigation
MDL Docket No. 1456, Lead Case No. 01-CV-12257 PBS; ***Swanston v. TAP
Pharmaceutical Products Inc., et al., Civil Action No. 01-CV-11157 PBS.***

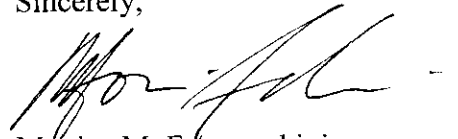
Dear Sir or Madam:

Enclosed for filing in the above-referenced action are:

- (1) Defendant TAP Pharmaceutical Products Inc.'s Motion For Protective Order; and
- (2) Defendant TAP Pharmaceutical Products Inc.'s Motion To Coordinate Depositions
And For A Protective Order.

Also enclosed are copies of the same. Please date-stamp the copies and return them to the awaiting messenger. Thank you for your assistance in this matter.

Sincerely,



Monica M. Franceschini

Enclosure

cc: All Counsel of Record In Re: Pharmaceutical Industry Average Wholesale Price
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